Land and Water
British Columbia Inc.
A corporation of the government of British Columbia

Aboriginal Interests Consideration Procedures

September 8, 2003

TABLE OF CONTENTS

Preface 1
New Approach to Consultation with First Nations 1
New Operational Procedures 1
Introduction 2
General Principles 4
Consultation Policy Principles 4
Operational Principles 6
Consideration for Water Act Licences and Approvals 7
Aboriginal Interest Consideration Procedures 10
1. Pre-Consultation Consideration 10
2. Initiate Consultation 12
3. Consider Aboriginal Interests 13
4. Consider Impacts of Proposal on Aboriginal Interests 15
5. Infringement Justification Consultation and/or Accommodation 17

APPENDICES
Appendix 1: First Nations Referral Letter
Appendix 2: Concise Aboriginal Interest Consideration Report
Appendix 3: Aboriginal Interest Consideration Report
Appendix 4: Key First Nation Consultation Policy Concepts
Appendix 5: Methods of Identifying First Nations
Appendix 6: Archaeological Sites Referrals Procedure
Appendix 7: Information Sources

FIGURES
Figure 1: Aboriginal Interests Consideration Process Summary
Figure 2: Factors That May Indicate Whether Further Consideration May Be Required
Figure 3: Factors That May Indicate Whether Potential Infringement is Likely

Preface

New Approach to Consultation with First Nations

In the past, the Province has taken the position that a constitutional and fiduciary obligation to consult only existed where aboriginal rights or title had been proven through a court process. Accordingly, the Province consulted as a matter of policy and administrative fairness, rather than as a constitutional and fiduciary obligation.

Recent decisions of the B.C. Court of Appeal in *Taku River Tlingit v. Ringstad* and *Haida Nation v. BC and Weyerhaeuser*, however, have confirmed that the Crown, whether federal or provincial, has a constitutional and fiduciary obligation to consult with aboriginal groups before authorizing activities on Crown land that could infringe their asserted, but unproven, aboriginal rights and title. The Provincial Policy for Consultation with First Nations (October 2002) was developed in response to those cases.

The term **"aboriginal interests"** is used throughout this document. For the purposes of these Procedures, the term "aboriginal interests" has the meaning intended by the Provincial Policy for Consultation with First Nations: i.e. aboriginal rights and/or title that have been asserted by First Nations but have not been proven to be existing rights through a court process. (The Province intends to develop a separate consultation policy in respect of treaty rights. When it does, LWBC may develop a separate set of procedures.)

New Operational Procedures

The new Aboriginal Interests Consideration Procedures (AICP) are needed to implement the Provincial Policy for Consultation with First Nations (October 2002). The Procedures are intended to provide specific direction in determining whether consultation with First Nations should be carried out and, if so, the extent of consultation required.

The operational process set out in these Procedures will ensure that aboriginal interests are considered in a consistent manner under both the *Water Act* and the *Land Act*.

Introduction

Purpose

To provide operational direction to Land and Water British Columbia Inc. (LWBC) decision makers and staff to ensure a consistent corporate approach to consultations with First Nations when delivering LWBC's mandated responsibilities.

Objectives

- Facilitate the implementation of the Provincial Policy for Consultation with First Nations (October 2002);
- Ensure a consistent approach to consultation in the course of decisions made under the *Land Act* and *Water Act*;
- Provide for operational clarity and cross-regional consistency in addressing aboriginal interests;
- Enable LWBC's business activities to be carried out in a timely and consistent manner, while ensuring that decision makers comply with any legal obligations with respect to consultation.

Scope

The Procedures apply to:

Land Act

- Applications for new and replacement Crown land tenures
- Applications to amend existing tenures
- Land sales and exchanges

Water Act

- Applications for new water licences
- Applications to amend water licences and substitution
- Approvals under Section 8 & 9
- Reservation of water under Section 44

Staff should discuss with the Director, Aboriginal Relations, and, where needed, legal counsel, any measures to address and/or accommodate aboriginal interests that may potentially be infringed by a Crown disposition.

Relation to the Aboriginal Interest Assessment Procedures

This document replaces the British Columbia Assets and Land Corporation *Aboriginal Interest Assessment Procedures* of September 1999.

Relation to the provincial Consultation Guidelines of 1998

The Consultation Guidelines of 1998 have been amended and replaced by the Provincial Policy for Consultation with First Nations (October 2002). This brings the policy into conformity with case law as of October, 2002 and consolidates within it the former Crown Land Activities and Aboriginal Policy Framework of 1997.

Variation from the Procedures

Any proposed variation from these Procedures must be reviewed with the Director, Aboriginal Relations and/or Land and Water Service Center Directors, and/or the Development and Marketing Regional Managers.

Corporate Aboriginal Relations Structure

The Director, Aboriginal Relations, is responsible for LWBC's First Nations policy and advises on its implementation.

Aboriginal Relations Officers (AROs), reporting to the Director, Aboriginal Relations, and based in the Corporation's four business centres, are responsible for providing advice to staff on the implementation of these Procedures.

AROs advise on non-standard correspondence with First Nations and bring non-routine aboriginal issues to the attention of the Director, Aboriginal Relations and the Land and Water Service Center Directors, and/or the Development and Marketing Regional Managers.

General Principles

Consultation Policy Principles

Legal duty to consider asserted aboriginal rights and title

Aboriginal rights, including aboriginal title, are not absolute and may be infringed by federal and provincial governments if the infringement satisfies a test of justification. That test has two parts: first, is the infringement in furtherance of a legislative objective that is compelling and substantial? Second, is the infringement consistent with the special fiduciary relationship between the Crown and aboriginal peoples?

Consultation with potentially affected First Nations is one aspect of the Crown's special fiduciary relationship with First Nations. The consultation process begins with due consideration of aboriginal interests, even if the rights being asserted have not yet been proven through a Court process.

One of the principal purposes of consultation is to enable the Crown to gain a proper understanding of the aboriginal interests and to seek ways to address and/or accommodate those interests where appropriate.

Consideration proportional to the soundness of the claim

Consultation must occur where an aboriginal group appears to have a sound claim or a good *prima facie* case (i.e. good evidence on the face of it) of an aboriginal right or title to potentially affected lands.

The scope of the consultation and the strength of the obligation to seek to address aboriginal interests or reach a workable accommodation are proportional to the potential soundness of the claim for aboriginal rights or title.

Scope of consultation

The Province has an obligation to consider all information available on reasonable inquiry in assessing aboriginal interests. In the absence of referral comments from a First Nation, information available from other sources should be considered.

Consultation includes providing a First Nation with information about the proposal, i.e. a referral, so that the First Nation has an opportunity to express its interests, and any other communication, e.g. telephone calls, letters or meetings, for purposes ranging from exchanging information or discussing concerns, to seeking to accommodate and/or address aboriginal interests.

Duty to accommodate aboriginal interests

Where it is likely that a decision by the Province may result in an infringement of aboriginal interests if those interests were subsequently proven, the Province must seek to address and/or accommodate the potentially infringed interests.

Accommodation is an arrangement between LWBC and a First Nation

which provides a workable solution to concerns identified by a First Nation, and at the same time allows the Corporation to achieve its objectives. Accommodation will normally be proportional to the soundness of the First Nation's claim and possible impact of the proposed activity on the claimed interests.

Please note that it is beyond the scope of these Procedures to give specific examples of accommodation, other than through avoidance or mitigation of potential impacts (e.g. changing the proposed location of the proposed activities or providing for alternative access). Each situation must be addressed on a case-specific basis. The Director, Aboriginal Relations must be consulted.

First Nation duty to express interests

The relevant aboriginal group has a reciprocal duty to identify their aboriginal interests and concerns once they have had the opportunity to consider the information provided. The First Nation must make a reasonable effort to inform the Crown about any impacts of the proposed activity on their aboriginal interests. The Courts have said that First Nations do not have the right to frustrate or veto Crown activities by refusing to participate in consultations, or by imposing unreasonable conditions. However, First Nations are entitled to a separate and distinct process of consultation, and are not to be lumped together with other interested stakeholders.

Operational Principles

Implementation of the Procedures

All decisions must be made on the basis of a reasoned, defensible assessment. All research, studies, letters, meetings, telephone calls, site visits and other efforts to obtain information about aboriginal interests prior to a decision are elements of the consultation process. Notes are to be taken of all meetings and relevant communications. These may have to be produced to substantiate consultation.

Decision to disallow a proposal

Proposals can be disallowed by LWBC decision makers at any time during the consideration of aboriginal interests where a significant potential for infringement of aboriginal rights or title is identified, and where the cost of further assessment exceeds the future economic and social benefits from the proposal. Since under the *Water Act* any decision may potentially be appealed to the Environmental Appeal Board, even refusal must be justifiable on this basis and/or on the basis of other relevant criteria.

Joint consultation

It is desirable that consultation on activities that involve a number of other agencies be integrated wherever possible to ensure maximum efficiency.

Consultation by Third Party (proponent)

The responsibility to address aboriginal interests in relation to an application rests primarily with the Crown; however, proponents are encouraged to provide First Nations who may be affected by the proposed application with information about the proposal. Where further consultation is required, proponents may be required to undertake consultation in coordination with LWBC staff and may be encouraged to seek to address First Nation concerns through appropriate measures available to the proponent.

Consideration for Water Act Licences and Approvals

Consultation for aboriginal interests and Water Act "rights"

First Nations consultation with respect to *Water Act* licences and approvals must be guided by both case law (in relation to aboriginal rights and title) and statute law (i.e. *Water Act* and Water Regulation). For example, the *Water Act* and *Water Regulation* provide for notice of a licence application to particular persons meeting specific criteria.[1] If the criteria are met, a First Nation may be considered to be a person with standing to object under the statute.

Separate and apart from the statute, the Crown may have a constitutional and fiduciary obligation to consult and seek to address and/or accommodate aboriginal interests.

In theory, a decision maker has authority under the *Water Act* to consider potential aboriginal rights and title by notifying "any other person … whose input the Comptroller or Regional Water Manager considers advisable." In practice, decision makers have tended to focus on potential impacts to an objector's actual licenced diversion, use or storage of water under the *Water Act*, on potential physical impacts on riparian land related to construction or operation of works or on potential physical impacts to land which may be crossed by works. This may or may not represent a potential infringement of aboriginal rights or title. In order to meet the Crown's legal obligations respecting consultation, decision makers must also focus on potential impacts to aboriginal interests.

It will usually be feasible to send one referral to a First Nation that will solicit information regarding a proposal's potential impact as may be recognized under the *Water Act* and on asserted aboriginal rights and title. Any reply to First Nations must be prepared with a clear understanding of the differences between the statutory requirements and constitutional and fiduciary requirements. In terms of the statutory scheme, it is necessary to look at relevant factors within the scope of the *Water Act* and Water Regulation, while current law provides direction with respect to potential aboriginal rights and title infringement.

The *Water Act* specifies no particular procedure with respect to requests

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[1] Section 3(2) of the *Water Regulation* specifies that:

"At a time or times the comptroller or regional water manager considers appropriate during consideration of an application for a license, notice of the application shall be given to

(a) any licensee or applicant for a water license whose rights will not be protected by the precedence of his license or application;
(b) any riparian owner whose rights may be prejudiced by the granting of the application;
(c) any owner whose property may be physically affected by the applicant's works; and
(d) any other person, agency or minister of the Crown whose input the comptroller or regional water manager considers advisable."

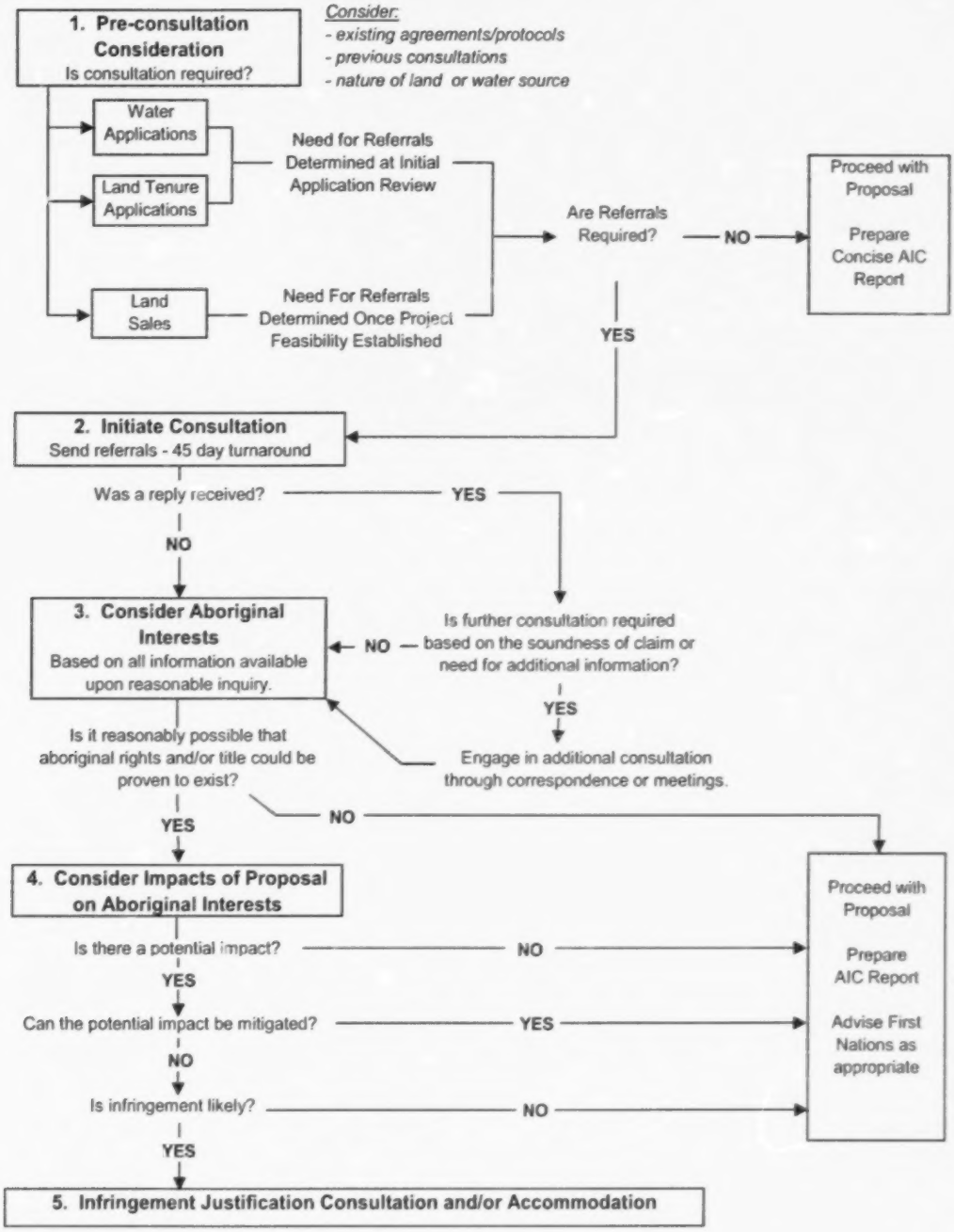
for approvals for short term diversion and use of water for periods not exceeding 12 months or for approvals for changes in and about stream such as activities or works in the stream channel. As these are typically short term in nature, there may be less potential for impacts on aboriginal interests.

Water Act Permit over Crown Land

Under Section 26 of the *Water Act*, a Permit on Crown Land (PCL) may be issued to authorize flooding of Crown land, or the construction, maintenance and operation of works on Crown land.

In general, aboriginal interests in the context of applications for a PCL should be considered in a manner similar to that for a *Land Act* License of Occupation or a temporary *Land Act* permit.

Figure 1: Aboriginal Interest Consideration Process Summary



Aboriginal Interest Consideration Procedures

1. Pre-Consultation Consideration
Consider whether referrals to First Nations are required

Where doubt exists on the need for First Nations referrals, they should be sent. The risk associated with proposals that have not been referred may be higher, because the decision is based solely on LWBC's internal consideration of potential aboriginal interests. For this reason an objective and defensible rationale, and good documentation, are critical. Factors must not be considered in isolation, but must form part of a synthesis of all the available information. A Concise Aboriginal Interests Consideration Report (CAICR) is to be prepared (Appendix 2).

NOTE: **It is not likely that this assessment will result in a determination that consultation is not required, except in very specific cases. In situations where decision-makers are unsure whether a decision or activity warrants consultation, ALWAYS use caution and consult the Director, Aboriginal Relations.**

Crown land tenure and water applications

The Client Services Coordinator (CSC) normally indicates at the time of initial application review whether First Nations referrals are recommended. It is expected that the Client Services Coordinator will consult with the ARO, Land Officer or Water Allocation Officer, as appropriate, in making this assessment. The basic rationale for the decision to not send referrals should be documented at that time. Field staff will rely on the rationale and, if necessary, expand it in the final report.

The following consideration should be undertaken by Land Management, Water and Development and Marketing staff and applied to all proposals:

An initial assessment should evaluate whether a particular decision or activity will require consultation. These assessments should help to ensure that consultation is carried out in a manner that is appropriate to the nature of the decision or activity and the nature of the interest being asserted.

STEP 1: Consider the nature of the land and/or water source

Is there no evidence of past aboriginal presence in the area based on an assessment of the available information? Has the land or water source been developed in a manner that precludes the exercise of aboriginal rights or the enjoyment of aboriginal title as a right of present possession? Is it surrounded by land that has been developed in a manner that precludes the exercise of aboriginal rights or the enjoyment of aboriginal title as a right of present possession? If so, staff may proceed without referring the proposal to First Nations.

STEP 2: Consider information about previous consultations in the area

Have First Nations indicated through previous consultation that they have no particular interest with respect to the subject area? Has this been indicated in contexts other than consultation, e.g. legal proceedings? If yes, staff may proceed without referrals, and may recommend that the proposal be cleared for First Nations issues. If not, proceed to STEP 3.

NOTE: It is imperative that consultation occurs wherever there is a sound claim of aboriginal rights and/or title, and where it is likely that a decision by the Crown would be likely to result in an infringement of aboriginal interest if those interests were subsequently proven to be aboriginal rights or title.

NOTE: If there is evidence of historical aboriginal presence in the area in question, or previous consultation has determined that aboriginal interests may be at issue in that area, and the nature of other existing interests in the land or the level of surrounding development do not preclude the ability to exercise aboriginal rights or enjoy aboriginal title as a right of present possession, then consultation is necessary and decision-makers should ensure that the process on the following pages in carried out.

STEP 3: Conclude pre-consultation consideration

Is consultation with First Nations required based on the assessment of the nature of the decision or activity and the nature of the interest being asserted?

(a) If consultation is **not required**, complete a *Concise Aboriginal Interest Consideration Report* (Appendix 2) and recommend clearing the proposal for First Nation issues.
OR
(b) If consultation is deemed **required**, staff should proceed to *Initiate Consultation.*

2. Initiate Consultation
Send referrals to First Nations

STEP 1: Identify First Nations that require consultation

First Nations asserted territories are normally identified by the BC Treaty Commission Statement of Intent maps or maps provided by First Nations. Appendix 5 summarizes general methods for the identification of relevant First Nation groups. See Appendix 7 for additional sources of information.

STEP 2: Referrals to First Nations

The referral package must consist of a referral letter (Appendix 1), adequate descriptive information, location maps and any other relevant documents to provide First Nations with appropriate information on the proposal. The information must be sufficient for the First Nation to bring forward any information relating to the likely impact of a proposal on their aboriginal interests, if such exist in the area. The normal referral period is 45 days, unless otherwise advised, and the letter should state that a reply is due within this timeframe. If requested by First Nations, the referral period may be extended if valid reasons exist, e.g. high complexity or large scope proposals.

NOTE: An objection under the *Water Act* must be filed within 30 days.

STEP 3: Other referrals

Referrals to Archaeo Research Ltd., seeking information about registered archaeological sites and/or the potential for the existence of unrecorded sites, may be required. This process is outlined in Procedures for Archaeological Sites Referrals (Appendix 6). Other referrals may include the Treaty Negotiation Office, Ministry of the Attorney General and/or other agencies with information relating to aboriginal interests in the subject area.

3. Consider Aboriginal Interests

STEP 1: Consider all information available on reasonable inquiry

Regardless of whether First Nations respond to referrals or other attempts to consult, decision makers must consider all evidence of aboriginal interests that is **available on reasonable inquiry.** This includes relevant information from past referral responses for the area and relevant information in possession of other provincial or federal agencies, including studies or information regarding Specific Claims. Staff should consider undertaking a site visit.

(Because of the obligation to consider all information available on reasonable inquiry, the Province is considering a number of tools such as information databases and regional resource management committees. When available, they will facilitate access to information. Staff and decision makers will be advised when these tools become available.)

STEP 2: Consider if further consultation is required

The scope of consultation must be proportional to the soundness of the claim for aboriginal interests that are at issue. Consultation efforts must attempt to address and/or accommodate a First Nation's concerns. The concerns must be those relating to the potential impacts of proposed activities on the aboriginal interests.

All accessible information should be evaluated, including referral response from the First Nation, if available. A decision regarding the need for further consultation is based on the evidence for aboriginal interests. This decision (options summarized in STEP 5 below) may be made at THIS time or upon the consideration outlined in further steps, depending on the evidence. However, there must be sufficient information to assess whether infringement of aboriginal interests appears likely, if these interests were to be subsequently proven as rights and/or title.

NOTE: Staff cannot make a legal determination as to the existence of aboriginal rights or title. Staff must NOT communicate their view of the soundness of the claims of aboriginal interests to First Nations or third parties.

STEP 3: Consider if aboriginal rights and/or title could be proven to exist by legal process.

Where it appears that a sound claim of aboriginal rights and/or title could be made out, consultation efforts must attempt to address and/or accommodate a

First Nation's concerns relating to the potential impacts of proposed activities on those aboriginal interests. The greater the soundness of the claim, the greater the potential that aboriginal rights and/or title could be proven to exist.

A combination of the following factors may indicate that aboriginal interests may subsequently be proven to exist, or may be used to infer that there is a relatively low possibility for their proof.

Figure 2: Factors that may indicate whether further consideration may be required

INDICATORS FOR ABORIGINAL TITLE AND/OR RIGHTS
• Title to the land has been continuously held in the name of the Crown; • Land or water source near or adjacent to a reserve or former settlement or village site; • Land or water source in areas of traditional uses or archaeological sites; • Land or water source used for aboriginal activities; • Notice of an aboriginal interest from a First Nation, even where made to another Ministry or Crown agency; • Land is referred to in a federal specific claim process; or • Undeveloped land such as parcels outside an urban area or close to known fishing, hunting, trapping, gathering or cultural sites.
INDICATORS AGAINST ABORIGINAL TITLE AND/OR RIGHTS
• Little indication of historical aboriginal presence in the area (e.g. land distant from reserves or settlement areas with no known aboriginal interests); • Land presently alienated in fee simple to third parties; • Land presently alienated on a long-term lease to third parties (length of occupation and the continuation of that interest may be important); • Land and/or water source developed in a manner that precludes the exercise of aboriginal rights or land developed in a manner that precludes the enjoyment of aboriginal title as a right of present possession; • Land within an urban area, or surrounded by lands that have been developed in a manner that precludes the exercise of aboriginal rights or the enjoyment of aboriginal title as a right of present possession; • No indication that First Nation has maintained, or continued to assert, despite any interference resulting from European settlement, a substantial connection or a special bond with the land since 1846; • Land was abandoned by First Nations in question prior to 1846; In the case of claimed aboriginal title, competing or conflicting aboriginal title claims to the same area by different First Nations (e.g. mutually exclusive overlapping claims). (Such overlapping claims may point, however to a higher possibility that aboriginal rights may be at issue.)

STEP 4: Decision

Is it reasonably possible that aboriginal rights and/or title could be proven to exist?

(a) If **not clear**, discuss evidence with the ARO. Seek advice from the Director, Aboriginal Relations if needed.
OR

(b) If **no**, proceed with the proposed disposition if the consultation process to that point has sufficiently considered the claim for aboriginal interests made out by the First Nation in question. Prepare an *Aboriginal Interests Consideration Report* (Appendix 3). The report must provide a rationale for the recommended decision.
OR

(c) If **yes**, consider the impacts of the proposal on aboriginal interests.
OR

(d) If **yes**, continue to consult if, based on the evidence, it appears that **more information is required**. In this case, decision makers should consider undertaking further research, studies, correspondence, meetings or other communications with the First Nation, as appropriate. Records of all communications and shared information must be kept as they might need to be produced in the event that the decision-making process is challenged in legal proceedings. Decision makers should periodically review the information available to ensure that a decision outline in (a), (b) or (c) is made without delay when sufficient information becomes available or when it becomes obvious that no more information will be forthcoming.
AND

(e) If a decision is reached with substantive input from a First Nation, or if a specific measure is requested by a First Nation, advise the First Nation of the decision and its rationale.

4. Consider Impacts of Proposal on Aboriginal Interests

STEP 1: Consider likelihood of infringement

Infringement of an aboriginal right will give rise to different considerations than infringement of aboriginal title. Whether a Crown activity will infringe an aboriginal right depends on the nature of the right and the nature of the activity. For example, if fishing is the claimed right, infringement will likely not occur unless the fish stock is significantly impacted or the preferred means of exercising the right to fish (e.g. fishing stations in certain locations) is denied. Because of the "exclusive" nature of aboriginal title (see Appendix 4), most Crown dispositions in an area subject to aboriginal title will result in some form of infringement. Therefore the focus in the case of title will be on whether the

infringement is justifiable, whether adequate consultation is undertaken and whether appropriate mitigation and/or accommodation is offered.

Figure 3: Factors that may indicate whether infringement is likely

CONSIDER THE FOLLOWING QUESTIONS
• Does the proposed activity potentially interfere with aboriginal activities? • Will the activity change or damage the nature of the land or water source or the availability of resources (e.g. fish, or wildlife), and to what extent? • In the case of asserted aboriginal rights, if there is proposed resource extraction, is the resource renewable or non-renewable and what effect will that have on the ability to continue to exercise the rights? • Will any of the land be sold to third parties? • Will long term tenures or water licenses be provided to third parties? • Are the tenures renewable, and does the renewal involve further changes to the land or water source, or further extraction of resources?

NOTE: If the identified aboriginal interest is an asserted aboriginal right, decision-makers need to consider whether the decision may create undue hardship on those claiming the aboriginal right, deny those who claim that right their preferred means of exercising the right, and is not unreasonable in all of the circumstances. If the decision is unlikely to infringe an aboriginal right, consultation in respect of infringement and justification likely will not be required.

NOTE: If the presence of aboriginal title is a strong possibility, then the possibility of infringement will be significant.

STEP 2: Decision

Is it likely that a decision to proceed with the proposal may result in an infringement of aboriginal interests, if aboriginal rights and/or title are subsequently proven to exist?

(a) If **not clear**, discuss evidence with the ARO. Seek advice from the Director, Aboriginal Relations if needed.
OR

(b) If **no**, proceed with the proposal if the consultation process to that point has sufficiently considered any claim for aboriginal interests made by the First Nation in question. Prepare an Aboriginal Interests Consideration Report (Appendix 3). The report should reflect the consideration undertaken and provide a rationale for the recommended decision.
OR

(c) If **yes**, proceed to mitigation, if appropriate, based on aboriginal interests. Mitigation usually takes the form of modifications to the proposal and often must be developed in consultation with other affected parties. If necessary, advice from the Regional Land and Water Manager should be sought.

Prepare an Aboriginal Interests Consideration Report (Appendix 3). The report should reflect the consideration staff had undertaken prior to the decision and provide a rationale for the recommended decision.
OR

(d) If **yes**, and mitigation not appropriate, proceed to *Infringement Justification Consultation and/or Accommodation.*
AND

(e) If a decision above is reached with substantive input from a First Nation or if a specific measure is requested by a First Nation, advise the First Nation of the decision and its rationale.

5. Infringement Justification Consultation and/or Accommodation

If further consultation to address and/or accommodate aboriginal interests appears to be required, proposals must be considered on a case-specific basis. The Director, Aboriginal Relations should be contacted. Legal advice will normally be sought.

APPENDIX 1

FIRST NATIONS REFERRAL LETTER

TO:	You are invited to comment on the following: ☐ Application for Crown land tenure ☐ Application for water license ☐ Application for approval under the Water Act ☐ Proposal for Crown land sale Copy of the application(s) attached. **Referral responses must be received by this office by**_____. If we do not hear from you by that date, we will move forward with the evaluation process. If you require additional information on the proposal(s), please contact the applicant.

APPLICANT'S NAME:	REF MAP No.	DATE SENT:
LAND CONTACT:	CONTACT PHONE NO:	LAND FILE NO:
WATER CONTACT:	CONTACT PHONE NO:	WATER FILE NO:

LAND APPLICATION

LOCATION OF CROWN LAND	PARCEL SIZE **Ha**
LEGAL DESCRIPTION	
INTENDED LAND USE	

LAND PROPOSED TENURE TYPE	LAND USE PROPOSED TERM	LAND USE PURPOSE

WATER LICENCE APPLICATION

SOURCE OF WATER			
INTENDED PURPOSE(S) or USE	QUANTITY	SUPPORTED BY STORAGE? YES ☐ NO ☐	
POINT OF DIVERSION	PERIOD OF USE	PLACE OF USE	PROPOSED COMPLETION DATE

CROWN LAND SALE

LOCATION OF LAND	PARCEL SIZE **Ha**
LEGAL DESCRIPTION	
PROJECT NAME	PROJECT NUMBER

RESPONSE COMMENTS:

Please review this referral and the attached information package, and provide comments on this form or on a separate page. Specifically, we are looking for information with respect to any aboriginal interests that may exist on, or adjacent to, the land or water source under application, the nature and extent of those interests and comments regarding how, specifically, the proposal might impact those interests. If you identify a potential impact, please indicate what mitigative measures, if any, would address your concerns.

Comments should be provided within 45 days from the date of the referral. If a response is intended, but cannot be provided within this time frame, please advise Land and Water BC Inc. as soon as possible. If you do not contact us within 45 days, Land and Water BC Inc. will continue with its review of the proposal, including the consideration of potential aboriginal interests, without your input.

☐ Approval Supported

☐ Interests Unaffected

☐ Approval Supported Subject To Conditions Outlined Below

☐ Approval Not Supported For Reasons Outlined On Reverse
(Indicate what mitigation measures, if any, would address your concerns)

Signed By (if non-electronic version of form used):	Title:
Please Print:	Phone Number:

APPENDIX 2

CONCISE ABORIGINAL INTEREST CONSIDERATION REPORT
First Nation Referrals Not Recommended

Date:
File Number:
Legal Description:
Water Source:
Report Completed By:

PDI, if applicable:
Project Name:
Project Number:

Signed By: _____

Proposed Use/Project Description:

First Nations referrals are not recommended because (check all that apply):

- ❑ There is no evidence of historical aboriginal presence in the area based on previous studies and/or referral responses.
- ❑ The First Nation has indicated through past referrals that they have no particular interests with respect to the land or water in the area.
- ❑ The land is presently alienated in fee simple and cannot be used for the exercise of aboriginal rights or the enjoyment of aboriginal title as a right of present possession.
- ❑ The land or water source will not be significantly altered by the proposal.
- ❑ The proposal is for replacement of an existing tenure with no changes where there are no known aboriginal interests based on an assessment of available information.
- ❑ The proposal is for minor tenure modifications or water license amendment that do not result in changes to the land or the water source.
- ❑ The land or water source has been developed in a manner that precludes the exercise of aboriginal rights or the enjoyment of aboriginal title as a right of present possession.
- ❑ The land is surrounded by development that precludes the exercise of aboriginal rights or the land is surrounded by development that precludes the enjoyment of aboriginal title as a right of present possession.
- ❑ The First Nation is the applicant and the area is in its claimed traditional territory and there are no overlapping First Nation claims.
- ❑ Previous FN referral responses indicate it has no interests in the area.
- ❑ The proposal is for rectification of a trespass where removal is not feasible or economic and risk of infringement is low.
- ❑ The proposal is for a foreshore/aquatic tenure in a highly developed area.
- ❑ The proposal is for an activity subject to previously consulted plans with no changes or minor changes that will not impact First Nation interests.
- ❑ The proposal is to license an existing unlicensed use where the works are in place, water is already being used and the proposal is not anticipated to have an impact.
- ❑ Other:

Summary of rationale for recommendation to not send FN referrals:

APPENDIX 3

ABORIGINAL INTEREST CONSIDERATION REPORT

Date:
File Number: PDI:
Type of Disposition or Approval:
Project Number: Project Name:
Legal Description:
Intended Purpose:
Intended Use:
Watercourse Name: Appurtenancy:

Recommendation:
Explain:

Report Completed By: Signature: _____

Attachments, if any:

ABORIGINAL INTEREST CONSIDERATION

First Nations potentially interested in the area or the watercourse

What is/are the First Nation(s) with potential interest?
List:

Referrals

Date First Nations referrals sent:

What other referrals related to First Nation issues were sent and when (if any)?
List:

Consider Aboriginal Interests

What responses were received from First Nations, if any? Have First Nations asserted aboriginal rights or title? What information was provided?

Summarize:

What referral response was received from Archaeology Branch (or Archaeo Research Ltd.)?
Summarize: (if YES)

What referral response was received from the Treaty Negotiation Office regarding treaty issues?
Summarize:

What other referral responses relevant to First Nation issues, if any, were received?
Summarize:

Was a site inspection carried out?
❑YES – Date: ❑ NO
Give reasons: (if NO)

Is the property subject to a Specific Claim?
Summarize:

What other information sources were considered? (new or previous studies, information from prior consultation with the First Nation(s) in question, information from other agencies)
Summarize:

Is the subject land and/or water source potentially suitable for aboriginal activities, including those of a spiritual or ceremonial nature?
Comments:

Consider Impacts on Aboriginal Interests

Are there any indicators that favour a potential for aboriginal title and/or rights?
- ❑ Title to the land has been continuously held in the name of the Crown;
- ❑ Land near or adjacent to a reserve or former settlement or village site;
- ❑ Land in areas of traditional uses or archaeological sites;
- ❑ Land used for aboriginal activities;
- ❑ Notice of an aboriginal interest from a First Nation, even where made to another Ministry or agency of the Crown;
- ❑ Land subject to a specific claim;
- ❑ Undeveloped land such as parcels outside an urban area or close to known fishing, hunting, trapping, gathering or cultural sites.

Are there any indicators against a potential for aboriginal title and/or rights?
- ❑ Little indication of historical aboriginal presence in the area (e.g. land distant from reserves or settlement areas with no known aboriginal interests);
- ❑ Land presently alienated in fee simple to third parties;
- ❑ Land presently alienated on a long-term lease to third parties (length of occupation and the continuation of that interest may be important);

- ❑ Land or water source developed in a manner that precludes the exercise of aboriginal rights or the land developed in a manner that precludes the enjoyment of aboriginal title as a right of present possession;
- ❑ Land within an urban area, surrounded by lands that have been developed in a manner that precludes the exercise of aboriginal rights or the enjoyment of aboriginal title as a right of present possession;
- ❑ No indication that First Nation has maintained, or continued to assert, despite any interference resulting from European settlement, a substantial connection or a special bond with the land since 1846;
- ❑ Land that was abandoned by First Nations in question prior to 1846;
- ❑ In the case of claimed aboriginal title, competing or conflicting aboriginal title claims to the same area by distinct First Nations (e.g. mutually exclusive overlapping claims). Such overlapping claims may point, however to a higher possibility that aboriginal rights may be at issue.

What meetings or other communications occurred in addition to referrals? What was the outcome?
Summarize:

Based on these indicators, and any other relevant factors, is further consultation recommended? In your rationale please consider the following: Is there a need for further information? Will the proposal result in significant alteration to the subject land or the water source? Will there be significant land improvements? Will the proposal likely interfere with aboriginal interests (if any)?

- ❑ YES
- ❑ NO

Summarize (explain reasons for conclusion):

APPENDIX 4

KEY FIRST NATION CONSULTATION POLICY CONCEPTS

What are aboriginal interests?

For the purposes of these Procedures, aboriginal interests have the meaning intended by the new provincial First Nations Consultation Policy: potentially existing aboriginal rights or title asserted by First Nations but not proven through a court process to be existing aboriginal rights and title.

What are aboriginal rights?

Aboriginal rights (based on the *Van der Peet* decision of the Supreme Court of Canada in 1996) are those practices, traditions or customs that are integral to the distinctive culture of an aboriginal society or are a central and significant part of the society's culture. The practice, tradition or custom must have been integral prior to contact with European society. Aspects of aboriginal society that are true of every society such as eating to survive do not qualify as aboriginal rights, nor do activities that are incidental or occasional. However, particular sustenance activities such as fishing for salmon by certain First Nations will qualify. The scope and content of aboriginal rights is determined through a Court process on a case-by-case basis.

Infringement of aboriginal rights

Governments may infringe existing aboriginal rights for a compelling and substantial objective. In general terms, the *Sparrow* test (based on the Sparrow decision of the Supreme Court of Canada in 1990) considers whether the aboriginal activity constitutes an aboriginal right; whether the proposed Crown activity infringes on that right (i.e. is unreasonable, imposes undue hardship or prevents the holder of the right the preferred means of exercising it); and, whether the infringement can be justified. To justify an infringement, the Courts will examine whether:

a. The Crown has a valid objective for the infringement, including the conservation and management of the resource, historical reliance on the resource by non-aboriginal people, and regional economic fairness (*Gladstone*, 1996, SCC);
b. First Nations had been given priority, after the objective was met;
c. There has been as little infringement as possible;
d. in the case of expropriation there was fair compensation; and
e. there was appropriate consultation.

What is aboriginal title?

Aboriginal title is a particular form of an aboriginal right (*Delgamuukw*, 1997, SCC):

- It is a right to exclusive use and occupation of land;
- It includes the right to choose to what use the land can be put by the holders of that title; the choice is not restricted to traditional uses and includes the exploitation of mineral rights;
- The uses cannot destroy the ability of the land to sustain the kinds

of activity which gave rise to the aboriginal title in the first place;
- It is a proprietary interest, but it is held communally; it cannot be alienated other than to the federal government;
- Aboriginal title is not absolute but it is a "burden" on Crown title (the Crown holds the underlying title) and it can be infringed by the Crown (e.g. put to another use).

The onus of proof of aboriginal title is on First Nations. The criteria that must be met:

- The land must have been occupied at sovereignty (1846);
- If present occupation is relied on as proof of pre-sovereignty occupation, there must be a continuity between present and pre-sovereignty occupation;
- Occupation must have been exclusive at 1846 (there can be shared exclusivity resulting in joint title).

Infringement of aboriginal title

Aboriginal title can be infringed by both the provincial and the federal Crown to advance a compelling and substantial legislative objective and if consistent with the fiduciary relationship between the Crown and First Nations. Valid objectives may also include land settlement, economic development and environmental protection. Because of the "exclusive" nature of aboriginal title, most Crown dispositions in an area subject to aboriginal title will result in some level of infringement, therefore the focus will be, in most cases, on whether the infringement is justifiable as per the principles set out in *Delgamuukw*:

- Compensation may be payable;
- Consultation must be carried out;
- The scope of the duty to consult may vary with the circumstances. In most cases the duty will be significantly deeper than mere consultation, and will require the intention to substantially address the concerns of the First Nation. In some circumstances, the full consent of the First Nation may be required, e.g. provincial regulation of aboriginal fishing and hunting on aboriginal title lands.

Proof of aboriginal title

A Court process is required for proof of aboriginal title. To this date there has been no judicial determination of the existence of aboriginal title anywhere in British Columbia. However, as in the case of aboriginal rights, a Court determination that the First Nation has aboriginal title is not required for the Crown to be legally obligated to consult. Rather, the legal obligation arises where a sound claim has been made.

APPENDIX 5

METHODS OF IDENTIFYING FIRST NATIONS

GEOGRAPHIC: First Nation identification is to begin with this method if the land is situated within the claimed traditional territories identified in the BC Treaty Process through a Statement of Intent. The Statement of Intent usually contains maps and defines the claimed traditional territory. (Not every First Nation has filed a Statement of Intent.)

A Statement of Intent map provided by a group of First Nations represented by an umbrella organization may not indicate the individual claimed traditional territories because member First Nations may not have defined their respective territories and/or there may be a significant territorial overlap within the group. It may be necessary to request specific information from the umbrella group or from the member First Nation(s). If direct inquiries are not appropriate, or are unsuccessful, use ethnographic research to identify First Nations not party to the treaty process.

ETHNOGRAPHIC: This method should be used to identify First Nations that are not party to the BC Treaty Process. (The claimed traditional territories of First Nations outside the BC Treaty Process may overlap those in the treaty process. One should not assume that because a First Nation in the Treaty Process claims a particular territory, there are no other First Nations with overlapping claims.)

The ethnographic method relies largely on historical and ethnographic sources. Staff should be aware that in some cases claimed traditional boundaries might be difficult to locate because the concept of formal territorial boundaries was not part of the traditional culture of many First Nations. Identification of the traditional aboriginal group as part of a modern First Nation may be laborious since many modern First Nations are amalgamations of formerly independent groups that still retain a sociopolitical identity within the First Nation, but are subsumed under the modern name.

APPENDIX 6

ARCHAEOLOGICAL SITES REFERRALS PROCEDURE

STEP 1: Conduct a preliminary analysis of available information:

- search RAAD (Remote Access to Archaeological Data) to locate registered archaeological sites (http://srmwww.gov.bc.ca/arch/RAADintro.html)*;
- analyze file information for records of archaeological evidence
- analyze site inspection information: topography, proximity to water sources; location in relation to known areas of archaeological significance, etc.; and,
- review available information on past aboriginal use or special interest by First Nations.

STEP 2: If the preliminary analysis demonstrates that the property:

- contains recorded archaeological sites;
- is located in the vicinity of recorded archaeological sites; or,
- is deemed by staff to have moderate or high potential for the presence of archaeological sites, mail, fax or e-mail referral packages to:

Archaeo Research Ltd.
205-2614 Bridge Street
Victoria, BC V8T 4S9
Phone: (250) 383-4583
Fax: (250) 383-4583
e-mail: specialprojects@archaeo.net
Contact: Chris Mundigler

The referral package should consist of a completed referral form and relevant maps, sketches and summaries of proposed land dispositions.

STEP 3: Archaeo Research will provide comments on the archaeological potential of land proposed for disposition and assess the significance of existing site data, if any, as requested.

Referrals are processed in a three-tiered manner. Depending on the complexity of the referrals, the processing period will be approximately 1 week.

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* Staff are <u>not</u> to use the existing reference maps for the purpose of locating registered archaeological sites, as the information is not current.

Referral comments in cases where the potential for archaeological impact is low are provided in the form of copies of archaeological site reports obtained from the Archaeology Branch and a basic analysis of the information.

In response to referrals with medium and high potential for archaeological impact, copies of archaeological site reports, in-depth analysis of available information and site-specific comments are provided.

Questions regarding archaeological site data, the use of RAAD or the advisability of a referral to Archaeo Research Ltd. should be directed initially to the Aboriginal Relations Officer.

STEP 4: Staff should incorporate archaeological site information and an analysis of the potential impact of a proposed land disposition into their assessment of aboriginal interests

APPENDIX 7

INFORMATION SOURCES

The Indian History of British Columbia: The Impact of the White Man by Wilson Duff (New Edition, 1992, Royal British Columbia Museum)
Identifies aboriginal groups by sociolinguistic groupings, traditional names ca. *1850*, names given by the Royal Commission on Indian Affairs in 1914, and band name in 1963. Appendix 2 provides First Nation Names in the 1990s.

A Guide to Aboriginal Organizations and Services in British Columbia published by the Ministry of Aboriginal Affairs, 2000.
Provides modern names of aboriginal groups and their umbrella groups.

Handbook of North American Indians, Volume 7, Northwest Coast, Wayne Suttles, volume editor, Smithsonian Institution, Washington, D.C., 1990;

Handbook of North American Indians, Volume 6, Subarctic June Helm, volume editor, Smithsonian Institution, Washington, D.C., 1981.

Handbook of North American Indians, Volume 12, Plateau Deward E. Walker Jr., volume editor, Smithsonian Institution, Washington, D.C., 1998.

Food Plants of Coastal First Peoples by Nancy Turner published by the Royal British Columbia Museum and UBC Press, 1995.
A handbook.

Food Plants of Interior First Peoples by Nancy Turner by the Royal British Columbia Museum and UBC Press, 1995.
A handbook.

Plant Technology of First People of British Columbia by Nancy Turner published by the Royal British Columbia Museum, 1998.
A handbook.

Land, Man and the Law by Robert E. Cail published by University of British Columbia, 1974
A history of government policy in British Columbia.

BC Indian Treaties in Historical Perspective by Dennis Madill published by Indian and Northern Affairs Canada, 1981
Describes the Vancouver Island treaties and Treaty 8.

Prehistory of the North-west Coast. R.G. Matson and Gary Coupland. Academic Press 1994. Very detailed, academic.

Western Sub-arctic Prehistory. Donald Clark. Canadian Museum of Civilization 1991.

Culturally Modified Trees of British Columbia: A Handbook for the identification and Recording of Culturally Modified Trees. Arnoud Stryd. Arcas Consulting Archaeologists. Ministry of Forests 1997. Field guide. Includes photos and Interior/Coastal specific information.

Culturally Modified Trees in the Pacific Northwest. Charles Mobley and Morley Eldridge. Article in Arctic Anthropology. Vol 29, No 2, 1992

Plants of the Pacific Northwest Coast. Jim Pojar and Andy MacKinnon. Ministry of Forests and Lone Pine Publishing 1994. Includes lots of ethnobotanical information, including on specific plants and First nations groups.

Plants of Northern British Columbia. Andy MacKinnon, Jim Pojar and Ray Coupe. Ministry of Forests and Lone Pine Publishing 1992. Includes lots of ethnobotanical information, including specific plants and First Nations.

Plants of Southern Interior British Columbia. Roberta Parish, Ray Coupe and Dennis Lloyd. Ministry of Forests and Lone Pine Publishing 1996. Includes lots of ethnobotanical information, including on specific plants and First Nations groups.

Researching the History of Aboriginal Peoples in British Columbia: A Guide to Resources at the British Columbia Archives and Records Services and BC Lands.

INTERNET SITES:

Ministry of Forests, Aboriginal Affairs Branch, Traditional Use Study Program
http://www.for.gov.bc.ca/aab/int_msrs/pim_tus.htm

Aboriginal Law and Legislation
http://www.bloorstreet.com/300block/ablawleg.htm#5

BC Association of Professional Consulting Archaeologists
http://www.bcapca.bc.ca/